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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-1676

MARY GADE, Director of the
Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial percentage of its resources to advancing the interests of the free enterprise system.

To that end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in cases of interest to the business community. *See, e.g., Lucas v. South Carolina Coastal Commission*, No. 91-453, *cert. granted*, 112 S. Ct. 436 (1991); *General Motors Corp. v. Romein*, No. 90-1390, *cert. granted*, 111 S. Ct. 2008 (1991).

WLF has actively participated in several cases that dealt with the preemptive effect of the Occupational Safety and Health Act of 1970 (the "OSH Act") on state laws concerning workplace safety and health. *See, e.g., People v. Pymm*, 76 N.Y.2d 511, 561 N.Y.S.2d 687 (1990), *cert. denied*, 111 S. Ct. 958 (1991); *People v. Chicago Magnet Wire*, 126 Ill.2d 356, 534 N.E.2d 962 (1987), *cert. denied sub nom. Asta v. Illinois*, 493 U.S. 809 (1989).

Both of those cases dealt with the OSH Act's preemptive effect on state criminal prosecutions. Although this case is civil in nature, many of the issues raised in the criminal law context are highly relevant to a determination of this case. Indeed, it is precisely because WLF's principal interest in OSH Act preemption issues concerns criminal law issues (and the increasing frequency with which states are bringing criminal prosecutions against business people based on their maintenance of allegedly unsafe working conditions, despite the defendants' apparent compliance with OSHA safety regulations) that WLF believes that it can assist the Court by providing the Court with a perspective that is distinct from that of either party.

WLF believes that an employer ought to be able to look to a single set of regulatory requirements when taking steps to ensure workplace safety and health, and that Congress provided employers with that right when it adopted the OSH Act.

WLF submits this brief on behalf of Respondent with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interest of brevity, WLF hereby adopts by reference the Statement of the Case as set forth in Respondent's brief.

In brief, Respondent National Solid Wastes Management Association ("NSWMA") has filed an action challenging the constitutionality of two Illinois laws providing for the training, testing, and licensing of hazardous waste site workers.[1] NSWMA contends, *inter alia*, that the Illinois laws are preempted by the express provisions of the OSH Act, as well as by regulations promulgated by the Occupational Safety and Health Administration ("OSHA").

The U.S. District Court for the Northern District of Illinois substantially rejected NSWMA's claim. It held that the state laws were not preempted; it held that state laws that attempt to regulate workplace safety and health are not preempted by the OSH Act when (as the court found to be true in this case) the laws have "a legitimate and substantial purpose apart from promoting job safety." Pet. App. 54.

The United States Court of Appeals for the Seventh Circuit reversed that decision. The Seventh Circuit held that the OSH Act preempts all state law (including the Illinois laws in question) that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety," unless OSHA has explicitly approved the law. Pet. App. 19. The appeals court found it irrelevant to the preemption issue that the Illinois laws did not simply

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[1] The laws at issue are the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat. ch. 111, ¶ 7701, *et seq.* (the "Operators Act"), and the Hazardous Waste Laborers Licensing Act, Ill. Rev. Stat. ch. 111, ¶ 7801, *et seq.* (the "Laborers Act"). The Operators Act covers persons working with cranes and hoists capable of lifting more than two tons, as well as their apprentices. The Laborers Act applies to all other general employees working at a hazardous waste cleanup site. Pet. App. 5.

regulate workplace safety and health but also had a public health purpose. Pet. App. 18. On December 16, 1991, this Court granted the petition for a writ of certiorari filed by Petitioner Mary Gade, Director of the Illinois Environmental Protection Agency ("IEPA") and the official charged with enforcement of the two Illinois laws in question.

Petitioner Gade devotes much of her brief to arguing that the OSH Act has *no* preemptive effect on state regulation of workplace safety and health. Only in the last three pages of her argument does she address the issue that has divided the courts of appeals: does OSHA preempt state laws that regulate workplace safety and health but also have a nonworkplace-related effect or purpose? Pet. br. 33-36. WLF's brief focuses primarily on the former issue, both because that is the focus of Petitioner's brief and because that issue is more relevant to WLF's principal concern in this area of the law: state criminal prosecutions based on maintenance of allegedly unsafe workplace conditions.

SUMMARY OF ARGUMENT

Section 18 of the OSH Act, 29 U.S.C. § 667, could hardly be more explicit in its preemption of state law. Where, as here, OSHA has issued a safety and health standard covering the safety issue in question and a state has failed to seek OSHA approval for its own regulatory scheme, all state regulation is preempted. Petitioners' and Judge Easterbrook's arguments to the contrary are based on a misreading of § 18 and/or a misunderstanding of what is meant by the term "explicit preemption."

WLF is particularly concerned by the increasing tendency of states to enforce their workplace safety standards through criminal prosecutions, even without receiving OSHA approval for such prosecutions. The Court needs to address the criminal law issue in this case, or else Illinois will be able to circumvent an adverse decision by recasting its challenged laws as criminal laws. The Court

should make clear that OSH Act § 18 preemption applies just as strongly to regulation through use of the criminal laws as it does to civil law regulation.

WLF fully supports the Seventh Circuit's application of OSH Act preemption to so-called "dual purpose" safety and health regulations. State regulation is preempted so long as it constitutes, in a direct, clear, and substantial way, regulation of worker safety and health -- regardless whether the regulation may also have a public health purpose or effect.

ARGUMENT

I. THE OSH ACT EXPLICITLY PREEMPTS STATE REGULATION OF WORKPLACE SAFETY IN AREAS REGULATED BY OSHA

The Supremacy Clause of the United States Constitution provides that the Constitution and laws of the United States shall be the "supreme Law of the Land." U.S. Const., art. VI, cl. 2. Accordingly, there can be no doubt that state law must give way to federal law whenever that is Congress's intent. Preemption of state law is "compelled whether Congress' command is explicitly stated in the [federal] statute's language or is implicitly contained in its structure and purpose." *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Congress's intent, when it adopted the OSH Act, to preempt state regulation of workplace safety standards regulated by OSHA is apparent both from the explicit language of the OSH Act and from an examination of the purposes of the act.

A. Section 18 of the OSH Act Includes Explicit Preemption Language

Every federal court that has ever considered the issue has concluded that the OSH Act explicitly preempts state regulation of workplace safety standards. In arriving at that conclusion in this case, the Seventh Circuit joined the

First, Second, and Third Circuits, among others. *See Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990); *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, 109 S. Ct. 3246 (1989).

Undaunted by that record, Petitioner devotes the greater part of her brief to arguing that the OSH Act was never intended to have any preemptive effect on state workplace regulations. *See* Pet. br. 12-33. Petitioner reasons that because the OSH Act does not use the word "preempt" in connection with its discussion of state regulation of workplace safety, the OSH Act cannot be said to have explicitly preempted such regulation. Pet. br. 14-16.

Although Petitioner's argument finds some support in Judge Easterbrook's opinion *debutante* as a member of the Seventh Circuit panel in this case (*see* Pet. App. 34-43), it rests on a fundamental misunderstanding of what is meant by "express preemption." Whether Congress has exercised its powers to preempt state regulation of a given subject matter is fundamentally a question of congressional intent. *English v. General Electric Co.*, 110 S. Ct. 2270, 2275 (1990).[2] Petitioner appears to argue that a federal statute cannot be said to expressly preempt state regulation unless the statute uses particular magic words, such as the

[2] For purpose of analyzing whether Congress has intended to exercise its preemptive powers in a given case, the Court has created two broad categories of circumstances under which preemption will be found: (1) "express preemption" (the intent to preempt can be discerned from the express language of the statute at issue (*Federal Fidelity*, 458 U.S. at 152-53)); and (2) "implied preemption" (which is said to exist where it is impossible to comply with both the state and the federal law; or where the federal regulatory scheme is pervasive, and the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress (*id.* at 153; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)).

word "preempt."[3] Nothing in the Court's case law suggests such a requirement. All the Court has ever required before making a finding of express preemption is that the federal statute at issue contain language that clearly expresses a congressional intent to preempt state regulation. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). As every federal court to consider the issue has found, the OSH Act contains just such language.

Although § 18 of the OSH Act, 29 U.S.C. § 667, does not use the term "preemption," it could hardly be more explicit in its preemption of state law. Section 18(a) provides that states may assert jurisdiction under state law over any occupational safety and health issue for which OSHA has not issued a safety standard.[4] Section 18(b) provides that even when OSHA has issued a safety standard covering a particular safety or health issue, a state may nevertheless assume responsibility for developing and enforcing its own standards with respect to that issue by

[3] Accordingly (Petitioner appears to argue), in light of Congress's failure to use the word "preempt" in the OSH Act in reference to state regulation of workplace safety, NSWMA is relegated to claiming that the OSH Act impliedly preempts such regulation. Pet. br. 14-17. But this Court has never used the term "implied preemption" in the sense that Petitioner is attempting to ascribe to the term: discerning whether a discrete statutory provision that deals explicitly with the subject of state regulation but fails to use the word "preemption" should be interpreted as mandating preemption of state regulation. Construing discrete statutory provisions has always fallen within "express preemption" analysis. "Implied preemption" looks to an entire federal regulatory framework -- not to individual statutory provisions -- and attempts to discern whether permitting state regulation would be consistent with that framework.

[4] Section 18(a) of the OSH Act, 29 U.S.C. § 667(a), provides:

> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

applying to OSHA for permission to do so.[5] Section 18(c) provides that OSHA is to approve such state applications if they meet certain OSHA criteria.[6] Accordingly, although § 18 does not use the term "preemption," the only plausible interpretation of the section is that Congress decreed that when OSHA issues a standard covering an "occupational safety and health issue," state law with respect to that safety and health issue is preempted unless

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[5] Section 18(b) of the OSH Act, 29 U.S.C. § 667(b), provides:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

[6] Section 18(c) of the OSH Act, 29 U.S.C. § 667(c), provides in part:

> The Secretary shall approve the plan submitted by a State under subsection (b), or any modification thereof, if such plan in his judgment --
>
> > (1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,
> >
> > (2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.

Section 18(c) goes on to impose six additional conditions for approval of state plans submitted under § 18(b).

and until the state applies to and receives permission from OSHA to promulgate its own standards covering the issue.

Petitioner makes no attempt in her brief to offer an alternative interpretation of § 18. Subsections 18(b) and 18(c) would be unintelligible if it were not Congress's intent that OSHA regulation of a workplace safety or health issue preempts state regulation of the issue in the absence of a OSHA-approved state plan. It would make no sense to provide that states wishing to regulate in an area already regulated by OSHA "shall" apply to OSHA for permission to do so (§ 18(b)), if states were also free to regulate without bothering to ask for permission to do so. Moreover, § 18(c)(2)'s mandate that OSHA not approve a state regulatory standard relating to products distributed or used in interstate commerce unless the standard is "required by compelling local conditions" and does not "unduly burden interstate commerce" would be meaningless if state's were free to impose their own standards regardless of an OSHA disapproval under § 18(c)(2).

Judge Easterbrook's conclusion that Congress may not have had any preemptive intent in adopting § 18 of the OSH Act is based on a misreading of § 18(b). Judge Easterbrook reads that subsection as though it begins, "Any State which, at any time, desires to assume *sole* responsibility" for workplace safety and health regulation. Pet. App. 35-36. The word "sole" does not appear in the subsection. Rather, the word "responsibility" is unmodified, and the most natural reading of the word is that Congress was providing an outlet for states that wished to assume *any* responsibility for workplace safety and health regulation. Moreover, Judge Easterbrook's interpretation fails to account for § 18(c)(2); that subsection would not provide its intended check on overly strict state regulations if, as Judge Easterbrook suggests, a state is unrestricted in its exercise of concurrent regulatory power and need apply to OSHA under § 18(b) only if it wishes to oust OSHA from workplace regulation within the state's borders.

Petitioner reliance on *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991), is misplaced. In that case, the Court held that language in the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.*, that expressly permitted state government regulation of pesticides should not be interpreted as prohibiting, by implication, local government regulation. *Mortier*, 111 S. Ct. at 2483. The Court explained, "Mere silence, in this context, cannot suffice to establish a 'clear and manifest purpose' to pre-empt local authority." *Id.*, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). But simply because Congress did not use the word "preemption" in § 18 does not make this a case of "mere silence." Section 18 provides the "clear and manifest purpose to pre-empt [state] authority" required by *Mortier*. FIFRA has no statutory equivalent to § 18, and thus the rationale underlying the *Mortier* decision is inapplicable here.

Section 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4), lends further support to a preemption argument. Section 4(b)(4) is a "savings" clause, providing that certain causes of action (principally, workers' compensation claims) are not superseded by the OSH Act.[7] Section 4(b)(4) strongly suggests that Congress intended the OSH Act to preempt at least some state laws, because there would have been no state laws in danger of being superseded (and thus in need of saving) unless the OSH Act was intended to have preemptive effect.

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[7] Section 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4), provides:

> Nothing in this Act shall be construed to supersede or in any manner affect workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

Finally, OSHA has issued a regulation finding that § 18 of the OSH Act is intended to preempt state workplace safety regulation of issues already subject to an OSHA standard, in the absence of an OSHA-approved state plan. *See* 29 C.F.R. § 1901.2. Accordingly, even if this Court were to find § 18 to be ambiguous regarding preemption, the Court should still reject Petitioner's interpretation of § 18, because the interpretation of an ambiguous statute by the agency charged with implementing that statute should be upheld so long as (as is true here) the agency's interpretation "is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

It is undisputed that OSHA has in place a safety and health standard covering protection of employees engaged in hazardous waste operations. *See* 29 C.F.R. § 1910.120 (1989).[8] It is also undisputed that the State of Illinois has never applied to OSHA pursuant to § 18(b) of the OSH Act for permission to issue its own workplace standards regarding hazardous waste operations. Accordingly, the Illinois laws are expressly preempted under § 18 of the OSH Act.

B. Section 18 of the OSH Act Implicitly Preempts State Regulation of Workplace Safety and Health

Even if the OSH Act did not include an explicit preemption of state regulation of workplace safety and health, Congress's intent to preempt such state enforcement is implicit in the structure and history of the OSH Act. Preemption of state law is to be implied

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[8] Indeed, although the OSH Act ordinarily leaves it to the Secretary of Labor to determine whether safety and health standards are needed in a particular area, Congress *required* OSHA to promulgate a standard for hazardous waste workers when it adopted § 126(a) of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. 99-499, 100 Stat. 1690 (1986) (codified at 29 U.S.C. § 655 note).

whenever, as here, "the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

Congress had a number of concerns when it adopted the OSH Act in 1970. A principal concern was that working conditions across the country be made safer and healthier for employees. But Congress was also interested in establishing national, "uniformly applied occupational safety and health standards." S. Rep. No. 91-1282, 91st Cong., 2d Sess. 1 (1970), *reprinted in Legislative History of the Occupational Safety and Health Act of 1970* ("*OSH Act Legis. Hist.*") at 141 (1971). Congress recognized that the solution to the problem of workplace safety required "comprehensive Federal legislation which would apply to all industries, and in a single national effort." *See* 116 Cong. Rec. 35607 (Oct. 8, 1970), *reprinted in OSH Act Legis. Hist.* at 297. Clearly, Congress's desire for "uniformly applied" standards could only be fulfilled if states were required to coordinate their regulation of workplace safety with OSHA.[9]

While Congress envisioned a state role in the enforcement of workplace safety, unbridled state discretion to impose a state's own workplace standards is inconsistent with Congress's desire that only "reasonably necessary or appropriate" safety standards be imposed. OSH Act § 3(8), 29 U.S.C. § 652(8). Congress recognized that no employer can provide a workplace that is 100% free of

[9] Congress's desire for uniform standards was born of its concern about the disparate treatment of employers from state to state and the competitive disadvantages imposed upon "conscientious" employers. 116 Cong. Rec. 37325 (Nov. 16, 1970), *reprinted in OSH Act Legis. Hist.* at 413. Thus, Congress saw a need to provide "fair and even" enforcement. 116 Cong. Rec. 36513 (Oct. 13, 1970), *reprinted in OSH Act Legis. Hist.* at 324. *See United Steelworkers of America v. Auchter*, 763 F.2d 728, 734 (3d Cir. 1985) ("Congress favored a uniform federal law so that those states providing vigorous protection would not be disadvantaged by those that did not").

risks to safety and health. Exposure standards for toxic substances are set by the OSH Act at a level "which most adequately assures, *to the extent feasible*, on the basis of the best available evidence, that no employee will suffer *material* impairment of health. . ." OSH Act § 6, 29 U.S.C. § 655(b)(5) (emphasis added). In fact, Congress specifically revised an earlier draft of the Osh Act "to make it perfectly clear that it does not require . . . standards that would assure an absolutely risk-free environment." *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 641, 646-49 (1980) (noting that "the legislative history . . . supports the conclusion that Congress was concerned, not with absolute safety, but with the elimination of significant harm"). Congress's desire that only "reasonably necessary and appropriate" workplace safety and health rules be imposed would be overridden if states were permitted to impose their own regulations without at least first seeking OSHA approval of those rules.

Petitioner contends that the OSH Act merely creates a floor rather than a ceiling for occupational safety and health standards and thus that states are free to go beyond OSHA's standards in imposing state occupational safety and health standards. Pet. br. 17. As noted above, that contention is belied by § 18 of the OSH Act, which provides the mechanism by which states may apply to OSHA for permission to regulate occupational safety and health issues for which OSHA has already promulgated a standard. Section 18(c)(2) of the OSH Act, 29 U.S.C. § 667(c)(2), provides that whenever a state wishes to impose safety and health standards regarding the manufacture of products which are distributed or used in interstate commerce, OSHA may approve those standards *only* if they are "required by compelling local conditions" *and* if they "do not unduly burden interstate commerce." Section 18(c)(2) demonstrates Congress's clear intention that states not be permitted to impose unduly burdensome workplace safety regulations. Permitting states to go forward with regulation of alleged workplace safety violations without first requiring OSHA review to ensure compliance with

§ 18(c)(2) is thus wholly inconsistent with the entire structure and purpose of the OSH Act.

In conclusion, both the structure and the history of the OSH Act dictate a finding that -- quite apart from the explicit preemption language of § 18 -- Congress impliedly intended to preempt state regulation of workplace safety. The purposes and intentions of Congress -- including creation of a relatively uniform system of workplace regulation that would not leave some employers at a disadvantage relative to other employers, and establishment of occupational safety and health standards that are not too onerous on employers -- would be frustrated if states were given free rein to impose their own occupational safety and health standards without first obtaining OSHA approval.

II. STATES HAVE BEEN FLOUTING THE OSH ACT'S PREEMPTIVE PROVISION BY BRINGING CRIMINAL PROCEEDINGS TO ENFORCE WORKPLACE SAFETY

WLF's primary interest in this case is not an academic interest in federal preemption doctrine but a very real concern that states are turning increasingly to their criminal laws to enforce their own workplace safety standards. Business people are being prosecuted despite substantial evidence that their business practices complied fully with OSHA safety and health standards. *See, e.g., People v. Pymm*, 76 N.Y.2d 511, 561 N.Y.S.2d 687 (1990), *cert. denied*, 111 S. Ct. 958 (1991); *People v. Chicago Magnet Wire*, 126 Ill.2d 356, 534 N.E.2d 962 (1987), *cert. denied sub nom. Asta v. Illinois*, 493 U.S. 809 (1989). Both cases involved prosecutions for violations of state reckless endangerment laws; prosecutors in both cases argued that while evidence that the employers had complied with OSHA standards was admissible, such evidence did not constitute a complete defense.

Perhaps not suprisingly, while federal courts uniformly have discerned in § 18 of the OSH Act a strong congressional intent to preempt state workplace safety laws, state

courts have been very reluctant to do so. Thus, at least three other states (in addition to New York in *Pymm* and Illinois in *Chicago Magnet Wire*) have held that state criminal enforcement of workplace safety is not preempted by the OSH Act -- even when OSHA has a standard in place that addresses the subject matter of the criminal prosecution and the state has failed to seek OSHA approval of its criminal enforcement scheme. *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127 (1989); *Sabine Consolidated, Inc. v. State*, 806 S.W.2d 553 (Tex. Cr. App. 1991) (*en banc*); *State v. Black*, 144 Wis.2d 745, 425 N.W.2d 21 (Wis. App. 1988). Each of those courts reasoned that even if § 18 of the OSH Act has some preemptive impact on state civil regulatory schemes, it should not be viewed as having any application to state criminal proceedings in the absence of explicit congressional language to that effect -- because the OSH Act is intended to protect employees in their capacity as workers, while state criminal prosecutions are intended to protect employees "as members of the general public." *See, e.g., Hegedus*, 443 N.W.2d at 134.

WLF requests that the Court use this case as an opportunity to determine the extent of § 18's preemptive effect on state criminal prosecutions. If it declines to do so, then Illinois would have an easy way to circumvent an adverse decision in this case: it could simply recodify the two laws at issues as criminal statutes and thereby claim that § 18 no longer is applicable to those laws. Indeed, the Seventh Circuit's decision below seemed to invite such conduct when it went out of its way to opine that state criminal laws are unaffected by § 18. Pet. App. 21 n.9.

WLF submits that the preemptive effect of § 18 is identical for both state criminal enforcement and state civil enforcement of workplace safety standards. The Seventh Circuit based its *dicta* to the contrary on its conclusion that state criminal laws are not "standards" within the meaning of the OSH Act; that conclusion is a clear misreading of the OSH Act. The OSH Act defines an "occupational safety and health standard" as a "standard which requires

conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment or places of employment." OSH Act § 3(8), 29 U.S.C. § 652(8). It is difficult to conceive how a criminal law threatening fines or imprisonment for those who fail to adopt particular workplace safety practices could be interpreted as falling outside the OSH Act's extremely broad definition of "occupational safety and health standard."

The Seventh Circuit was also wrong in opining that the OSH Act's savings clause, § 4(b)(4), 29 U.S.C. § 653(b)(4), precludes preemption of state criminal prosecutions. Pet. App. 21 n.9. By its terms, § 4(b)(4) only addresses actions involving rights, duties, or liabilities of "employers *and* employees" (emphasis added). Since a criminal prosecution against an employer affects only the rights, duties, or liabilities of employers but not of employees as well, § 4(b)(4) does not apply. If § 4(b)(4) had been meant by Congress to apply whenever either the rights, duties, or liabilities of employers were at stake *or* the rights, duties, or liabilities of employees were at stake, then the provision would have read "employers or employees" rather than "employers and employees."

Most commentators have interpreted § 4(b)(4) as applicable only to workers' compensation and tort law, not to criminal law. That is true even of commentators who do not believe that the OSH Act preempts criminal law. *See, e.g.*, Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535, 543 n.52 (1987). Indeed, if § 4(b)(4) were interpreted as "saving" criminal prosecutions from preemption, the exception would swallow the rule: § 4(b)(4) would be so broad as to render § 18 a nullity, and states would be free to regulate occupational safety and health issues as they pleased.

States generally have argued that preemption of state criminal prosecution of workplace safety violations should not be permitted in light of the states' strong interest in the enforcement of their general criminal laws. However, the importance to a state of a particular law has no bearing on the issue of whether Congress intended to preempt application of that law. *See Fidelity Federal*, 458 U.S. at 153 ("[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail").

Moreover, if a state is sufficiently concerned about its ability to bring criminal prosecutions for violations of workplace safety standards, it is free to apply to OSHA for permission to do so, pursuant to § 18(b) of the OSH Act.[10] Of course, any such application is subject to review by OSHA under the standards set forth in § 18(c)(2), because Congress has made clear that it will not permit undue state safety regulation of the workplaces of product manufacturers. But since Illinois and many other states have never applied to OSHA for permission to invoke state criminal laws in order to regulate workplace safety issues, they are in no position to complain that the OSH Act unfairly interferes with criminal prosecutions in such cases.

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[10] Numerous states have done precisely that. *See* Bokat, *Criminal Enforcement of OSHA: Employers' Rights at Risk*, 17 N. Ky. L. Rev. 135, 140 (1989); Note, *supra*, 101 Harv. L. Rev. at 539. For example, OSHA-approved state plans in California and Washington provide for criminal penalties for any "serious" violations of OSHA standards. Cal. Lab. Code § 6425 (West 1977); Wash. Rev. Code § 49.17.190 (West 1986). Minnesota's state plan provides for fines of up to $10,000 and imprisonment of up to six months for any willful or repeated violation of OSHA standards without a requirement that a death occur as a result of the violation (as is required before criminal penalties may be imposed under the OSH Act). Minn. Stat. § 182.667 (West 1986). Some states have been allowed by OSHA, as part of the adoption of a state plan, to prosecute certain workplace safety and health violations under their general state criminal laws. For example, North Carolina has been allowed to prosecute allegations of willful homicide. N.C. Gen. Stat. § 95.139 (Michie 1985).

In conclusion, the issue of whether a state may use its criminal laws to regulate workplace safety is too closely related to other issues directly raised in this case to allow the issue to go unmentioned in the Court's decision. WLF asks the court to rule that § 18 of the OSH Act preempts unapproved state regulation of workplace safety regarding issues for which OSHA has already issued a safety standard, and that the preemptive effect is equally strong whether the state regulation takes the form of civil or criminal law.

III. THE COURT SHOULD ADOPT THE SEVENTH CIRCUIT'S STANDARD REGARDING DUAL-PURPOSE SAFETY AND HEALTH REGULATIONS

The courts of appeals are split regarding the application of § 18 to so-called "dual purpose" safety and health regulations -- state regulations whose purpose (or effect) covers regulation not only of workplace safety but also of public safety. WLF fully supports the Seventh Circuit's resolution of that issue: the OSH Act preempts all state law (including the Illinois laws at issue here) that "constitutes, in a direct, clear and substantial way, regulation of worker health and safety," unless OSHA has explicitly approved the law -- regardless whether the law also has a public health purpose. Pet. App. 18-19.

Because WLF finds the Seventh Circuit's reasoning persuasive, it will not repeat each of that court's arguments here. Nonetheless, WLF does wish to stress one point. If IEPA is genuinely concerned about the public health implications of hazardous waste work, it is free to adopt laws that directly address those implications without becoming involved in workplace safety regulation. For example, Illinois could adopt a law that prohibits the removal of hazardous waste residue from a work site. The upshot of such a law might be that employers would be required to implement many of the provisions of the Operators Act and the Laborers Act in order to ensure compliance with the new law; but no one could argue that

such a law would be preempted under § 18, because it would not "constitute[], in a direct, clear and substantial way, regulation of worker health and safety." Alternatively, Illinois could seek OSHA approval for its challenged statutes. Accordingly, Illinois should not be heard to argue that a ruling for the NSWMA would undermine its ability to protect public health.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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